Supreme Court, U. S.
FILED
JUN 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1791

In the Matter of:
CHARLES MOORE BARDWELL, JR., ET AL.,
Bankrupts.

CHARLES MOORE BARDWELL, JR., ET AL.,
Petitioners

v.

SPRING WOODS BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI

DALE LEDBETTER
Attorney for Petitioners
609 Fannin Building, Suite 1229
Houston, Texas 77002 228-9095

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
AUTHORITIES	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY and RULES PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT OF CERTIOARI	8
CONCLUSION	13
APPENDIX A	
1. Opinion of the Fifth Circuit	15
2. Notice of Rehearing Denied	16
3. Memorandum and Order	17
4. Judgment in Bankruptcy Court	19
APPENDIX B	
1. Order Denying Leave to Amend	26
2. Motion for Leave to Amend	28
3. Respondent's Complaint	33
APPENDIX C	
1. Pre-Trial Order	39
2. Notice of First Meeting of Creditors	45

AUTHORITIES

CASES	Page
Dunn v. Koehring Co., 546 F.2d 1196 (5th Cir., 1971)	10
Foman v. Davis, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966)	9
Freeman v. Continental Gin Company, 381 F.2d 459 (5th Cir., 1967)	10, 13
Glint Factors, Inc. v. Schnapp, 126 F.2d 207 (2nd Cir., 1942)	12, 13

CASES	Page
Hall v. National Supply Company, 270 F.2d 379 (5th Cir., 1959)	10
In Re Pechin, 225 F. 798 (E.D. Pa., 1915)	12
In Re Westec, 434 F.2d 195 (1970)	10
In The Matter of Sturdevant, 415 F.2d 465 (5th Cir., 1969)	12
Jones v. Metzger Dairies, Inc., 334 F.2d 919 (5th Cir., 1964)	10
Katchen v. Landy, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966)	10, 12
Nevels v. Ford Motor Co., 439 F.2d 251 (5th Cir., 1971)	10
Solove v. Chase Manhatten Bank, 388 F.2d 874 (5th Cir., 1968)	12, 13
Spach v. Strauss, 373 F.2d 641 (5th Cir., 1967)	12
Violiva v. Bennett, 201 F.2d 434 (5th Cir., 1953)	10
Watson v. Employers Liability Assurance Corp., 202 F.2d 407 (5th Cir., 1953)	10
Wealden Corp. v. Schwey, 482 F.2d 550 (5th Cir., 1973)	10
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971)	9

STATUTES

11 U.S.C. § 32	2, 4, 5, 11, 12
11 U.S.C. § 35	2, 5
28 U.S.C. § 1254(1)	2

RULES OF COURT

Federal Rules of Civil Procedure	
Rule 15(a)	3, 4, 8
Rules of Bankruptcy Procedure	
Rule 404	3, 11
Rule 715	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. _____

In the Matter of:
CHARLES MOORE BARDWELL, JR., ET AL.,
Bankrupts.

CHARLES MOORE BARDWELL, JR., ET AL.,
Petitioners

v.

SPRING WOODS BANK,
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioners, CHARLES MOORE BARDWELL and RACHEL HUDGINS BARDWELL, respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this cause.

OPINIONS BELOW

On October 10, 1975, the Bankruptcy Judge entered an Order in this cause denying Respondents' Motion for Leave to File Amended Complaint. On August 18, 1977, the District Court for the Southern District of Texas, issued a Memorandum opinion and Order remanding this cause to the Bankruptcy Judge instructing him to consider the allegations in the attempted amendment. The Court of Appeals affirmed without opinion on February 23, 1978, and denied Petitioners' timely Motion for Rehearing on March 21, 1978.

None of the above opinions have been published and all are reproduced in the appendix.

JURISDICTION

As before noted, the Court of Appeals entered its Order on February 23, 1978, and denied a timely filed Motion for Rehearing on March 21, 1978. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners initiated voluntary bankruptcy proceedings in the United States District Court for the Southern District of Texas, Houston Division, in April of 1975. Respondent sought to block their discharge under § 14c (3) of the Bankruptcy Act (11 U.S.C. § 32) and § 17a(2) of the Bankruptcy Act (11 U.S.C. § 35) as a reuslt of one specific item contained in a financial statement given to Respondent. Thereafter, Respondent sought to amend its complaint by alleging, as materially false, additional items on the financial statement. The questions here

presented arise out of Respondent's attempted amendment and are:

1. Did the Bankruptcy Judge abuse his discretion under Rule 715 (which adopts Rule 15(a), Federal Rules of Civil Procedure in relevant part) by denying Respondent leave to amend?

2. Are the matters which Respondent sought to include new and therefore untimely specifications of grounds to bar discharge or mere amplification of previously plead grounds?

STATUTORY AND RULES PROVISIONS INVOLVED

Rule 404(a), Rules of Bankruptcy Procedure provides as follows:

> "(a) Time for Filing Complaint Objecting to Discharge. The court shall make an order fixing a time for the filing of a complaint objecting to the bankrupt's discharge under § 14c of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203(b), the court may fix such time as early as the first date set for the first meeting of creditors."

Rule 715, Rules of Bankruptcy Procedure provides in pertinent part as follows:

> "Amended and Supplemental Pleadings. Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceedings except that (1) a pleading to which no responsive pleading is permitted may be amended as a matter of course at any time with-

in 15 days after it is served but before the date set for trial and that (2) a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 5 days after service of the amendment pleading, whichever period may be longer, unless the court otherwise orders."

Rule 15(a), Federal Rules of Civil Procedure provides in pertinent part as follows:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Section 14c(3), Bankruptcy Act provides in pertinent part as follows:

"(3) while engaged in business as a sole proprietor, partnership, or as an executive of a corporation, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condi-

tion or the financial condition of such partnership or corporation;"

Section 17a(2), Bankruptcy Act provides in pertinent part as follows:

"(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or for obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another;"

Section 14b(1) and (2), Bankruptcy Act provides in pertinent part as follows:

"b. (1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to paragraph (2) of subdivision c of section 17 of this Act determine the dischargeability of debts, which time or times shall not be less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 58b of this Act. The court may upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications."
"b. (2) Upon the expiration of the time fixed in the order for filing objections or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed

and if the filing fees required to be paid by this Act have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard."

STATEMENT OF THE CASE

On April 10, 1975, Petitioners initiated Voluntary Bankruptcy Proceedings. Thereafter, the Bankruptcy Judge set May 8, 1975 as the date for the first meeting of creditors and established June 9, 1975 as the final date to file objections to discharge. Respondent ("SPRING WOODS") filed its Complaint on May 14, 1975, alleging violations of Section 14c(3) and Section 17a(2) of the Bankruptcy Act as a result of certain information contained in a financial statement furnished to SPRING WOODS.

SPRING WOODS' Complaint, which is reproduced in the appendix, alleges that Petitioners made a materially false statement on the document because it lists as an asset, the following: "Trust: per estate of Maye P. Cox., Dec., No. 73-14-77P in Dallas County". SPRING WOODS complains that Petitioners listing was false because the trust contained a "spendthrift" clause making it unavailable to creditors prior to distribution and because the beneficiary of trust, MRS. BARDWELL, was four (4) years away from attaining the age of termination.

In response to the filing of the Complaint, the Bankruptcy Judge set a pre-trial hearing for July 8, 1975 and

on August 7, 1975, entered a Pre-trial Order setting the matter for trial on October 14, 1975. He ordered that discovery be completed and SPRING WOODS file its trial statement by September 15, 1975. The Order provides in part:

> "Upon failure of any party to comply with any material portion of this Order the complaint may be dismissed or the party denied the right to introduce evidence at the trial. The times stated in this Order are material to the efficient administration of these proceedings."

SPRING WOODS noticed Petitioners for depositions on August 21, 1975, and on September 15, 1975, sought to amend its Complaint to allege as stated in its application to amend:

> "2. Adding two additional matters, contained in such financial statement which Plaintiff would further show are also materially false: the omission from such financial statement of over $24,250.00 owing on promissory notes to Defendant RACHEL HUDGINS BARDWELL's Mother, Doris Cox Shook which sum was not included in such financial statement under the heading 'Notes Payable To Relatives' and the omission from such statement of any reference to Defendant CHARLES MOORE BARDWELL, JR.'s 1968 bankruptcy proceeding which should have been disclosed in response to the printed inquiry, 'Have You Ever Taken Bankruptcy? Explain: . . .', on the front page of the financial statement."

In its brief to the District Judge, SPRING WOODS admits that it knew about the matters which it sought

to include by way of amendment as early as June of 1975 and that it waited for ten (10) days after it completed discovery before it filed for leave to amend. At no time has it ever explained or attempted to explain the reason why it waited until the day discovery closed to attempt to amend.

On October 10, 1975, the Bankruptcy Judge denied SPRING WOODS request to include the new matters and after trial, denied SPRING WOODS' claim by Judgment entered November 25, 1975.

SPRING WOODS appealed to the District Court, which on August 18, 1977, found that the Bankruptcy Judge abused his discretion in refusing to allow the amendments and remanded the matter to the Bankruptcy Judge to consider the new allegations. The District Judge' opinion was affirmed without comment of the Fifth Circuit and rehearing was denied.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

By use of the word "Affirmed" on a Summary Calendar, without more, the Fifth Circuit panel, like the District Court before it, has destroyed the authority of trial Judges throughout the federal system to keep control of their dockets and has effectively changed that portion of Rule 15(a) which says "and leave shall be freely given when justice so requires." to *must* be given. In short, if a trial judge abuses his discretion by refusing to allow a major pleading amendment when it is in violation of the Court's pre-trial order, when it was attempted on the day discovery closed and trial statements were due,

which concerned matters which were within the knowledge of the pleader more than three (3) months before the attempted amendment and which was offered without any excuse for tardiness, then a trial judge has no discretion. The effect of this decision on Bankruptcy matters is even more severe than ordinary civil matters since it has the effect of injecting even further delay into matter which Congress intended should be concluded within a limited period.

The reversal of the trial judge in this matter is in direct conflict with applicable decisions of this Court and is a wide departure from the accepted and usual course of judicial proceedings. *Forman vs. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed 2d 222 (1962), sets forth the standards to be used in considering this issue. This Court states at page 182:

> "In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be freely given."

Clearly the trial judge's denial in this matter met several of the above tests, namely, undue delay, dilatory motive, and undue prejudice. See also *Zenith Radio Corp. vs. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L. Ed. 2d 77 (1971).

By denying the trial judge the right to have his pretrial orders enforced and complied with, the District

Court and the Fifth Circuit have not only violated this Court's decisions, but have also completely ignored or overturned twenty-five (25) years of Fifth Circuit precedent which has never been in doubt until now. From 1953 through 1977, the string has been unbroken. A representative collection of Fifth Circuit cases continually upholding the trial judge's discretion unless a clear abuse of discretion is shown is:

Violiva vs. Bennett, 201 F.2d 434 (1953)
Watson vs. Employers Liability Assurance Corp., 202 F.2d 407 (1953)
Hall vs. National Supply Company, 270 F.2d 379 (1959)
Jones vs. Metzger Dairies, Inc., 334 F.2d 919 (1964)
Freeman vs. Continental Gin Company, 381 F.2d 459 (1967)
In Re Westec, 434 F.2d 195 (1970)
Nevels vs. Ford Motor Co., 439 F.2d 251 (1971)
Wealden Corp. vs. Schwey, 482 F.2d 550 (1973)
Dunn vs. Koehring Co., 546 F.2d 1193 (1977)

In *Katchen vs. Landy*, 382 U.S. 323, 86 S.Ct. 467 15 L.Ed.2d 391 (1966) at Page 329, this Court once again set forth the intent of Congress with regard to bankruptcy matters:

> "Moreover, this Court has long recognized that a chief purpose of the bankruptcy laws is 'to insure a prompt and effectural administration and settlement of the estate of all bankrupts within a limited period'."

If one adds to that the Fifth Circuit's own statement in *Nevels vs. Ford Motor Company*, supra, at Page 257:

> "While it is generally true that leave to file amendments should be freely given, Fed. R. Ci. P. 15(a), amendments should be tendered no later than the time of pre-trial, unless compelling reasons why this could not have been done are presented. In these times of logjammed trial dockets, a trial Judge must exercise sound discretion in deciding motions for leave to amend. His decision must weigh good cause shown for the delay in moving, *vis a vis* dilatoriness of cousel resulting in last minute surprise and inability of opposing counsel to meet the tendered issue.",

it is clearly seen that both of the Appellate Courts in this matter have acted contrary to this Court's wisdom and the well established procedure regarding amendments.

In addition to the discretion point, the same facts in this matter raise the fairly novel Bankruptcy issue of new matter versus amplification. By affirming, the Fifth Circuit has decided an important question of federal law, the effect of which is to extend a Bankrupt's exposure to new grounds for objections to discharge until literally to the time of trial and to abrogate the provisions of Section 14b(1) and (2), Bankruptcy Act and Rule 404, Rules of Bankruptcy Procedure.

Please recall that SPRING WOODS' original complaint complained of the listing of the trust item on the financial statement and that the proposed amendments sought to complain about the failure to answer a question about a prior bankruptcy and the failure to correctly state the sums owed to relatives. SPRING WOODS has consistently maintained that, although the items are unrelated and have nothing to do with each other, that since

they appear on the same piece of paper the time limit never runs and that they could, on a relation back theory, be brought in at any time, conceiveably even after trial. Even though this argument is neither substantively logical or in line with § 14b(1) and (2) of the Bankruptcy laws or *Katchen vs. Landy*, supra, by affirmance, the Appellate Courts in this matter apparently agree. Such an approach makes a mockery of a Bankrupt's right to have the laws liberally construed in his favor, [see *Spach vs. Strauss*, 373 F.2d 641 (5th Cir., 1967)] and to carry out this Court's mandate in *Katchen*, supra. Such is also contrary to the 2nd Circuit's decision in *Glint Factors, Inc. vs. Schnapp*, 126 F.2d 207 (2nd Cir., 1942).

Few Bankruptcy cases have considered this point and your writer has found none where this Court has spoken on the matter. In some instances the Courts have struck pleadings for lack of specificity but granted the right to replead, such as in *In the Matter of Sturdevant*, 415 F.2d 465 (5th Cir., 1969), with which your writer has no quarrel, or the case pre-dates modern practice such as *In Re Pechin*, 225 Fed. 798 (E.D. Pa., 1915), which gives us insufficient facts to tell what happened. Neither situation is in point. On the other hand, *Glint Factors, Inc. vs. Schnapp*, supra, and *Solove vs. Chase Manhattan Bank*, 388 F.2d 874 (5th Cir., 1968) sets forth the approach which your writer urges should be adopted and established by this Court.

In *Solove*, supra, the creditor argued the "one class-all item" or "global" theory and relation back doctrine. The Court rejected the idea that by alleging fraud with regard to specific statements of the Bankrupt, it could later amend to include additional specific allegations of

fraud, simply because the before and after allegations were both in the same general class, namely, fraud. Our facts match this case exactly but both Appellate Courts have either ignored or rejected *Solove*, supra. *Glint*, supra, on the other hand, is the opposite situation. In that case the Creditor alleged fraudulent transfers to friendly creditors and while a motion to strike for lack of specificity was pending, the Court allowed an amendment to set forth specific persons and amounts involved in the transfers. In other words, the creditor was allowed to be more specific about what it had alleged in the first place.

This Court should decide this issue of Bankruptcy practice so that both Bankrupts and Creditors will know the standard of pleadings required in adversary proceedings.

CONCLUSION

Your writer is mindful of this Court's oppressive workload and relatively small number of Writs granted but Petitioners believe that this case presents, in one fact situation, the opportunity to restore control of the trial docket to the trial judge and to affirm the well reasoned statement in *Freeman vs. Continental Gin Company*, supra, that the right to amend is not a "mechanical absolute", but is to be left "to the informed, careful judgment and discretion of the Trial Judge as he superintends the development of a cause toward its ultimate disposition." and additionally, resolve the conflict between relation back by amendment and new grounds for ob-

jection. Petitioners would show and respectfully pray that a Writ of Certiorari be granted.

DALE LEDBETTER
Attorney for Petitioners
609 Fannin Building, Suite 1229
Houston, Texas 77002 228-9095

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2931
Summary Calendar*

In the Matter of: CHARLES MOORE BARDWELL, JR., ET AL., Bankrupts.

SPRING WOODS BANK,
Appellee
versus
CHARLES MOORE BARDWELL, JR., ET AL.,
Appellants

Appeal from the United States District Court
for the Southern District of Texas

(February 23, 1978)

Before MORGAN, CLARK, and TJOFLAT, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

* Rule 18, United States Court of Appeals, Fifth Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Co., 431 F.2d 409 (5th Cir. 1970).

1. See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

UNITED STATES COURT OF APPEALS
Fifth Circuit

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

March 21, 1978

TO ALL PARTIES LISTED BELOW:

No. 77-2931—In the Matter of: CHARLES MOORE BARDWELL; SPRING WOODS BANK v. CHARLES MOORE BARDWELL, JR., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ BRENDA M. HAUCK
Deputy Clerk

* on behalf of appellants, Charles Moore Bardwell, Jr., et al.

bmh

cc: Messrs. Dale Ledbetter
Charles Bardwell
Mr. Don Stocking

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKRUPTCY NO. 75-H-301
BANKRUPTCY NO. 75-H-302

ADVERSARY A

IN RE:
CHARLES MOORE BARDWELL, JR., and
RACHEL HUDGINS BARDWELL

SPRING WOODS BANK,
Appellant,

v.

CHARLES MOORE BARDWELL, JR., and
RACHEL HUDGINS BARDWELL,
Appellee.

Memorandum Opinion and Order:

In this appeal from the decision of the Bankruptcy Court, the Appellant-bank argues that the Bankruptcy Judge erred in finding that the financial statement submitted by the bankrupts was not "materially false" and abused his discretion in not permitting the Bank to amend its complaint to allege other discrepancies in the financial statement which would go to the issue of material falsity.

Although this court is mindful of the need to avoid unnecessary delays in a bankruptcy proceeding, leave to amend pursuant to Fed. R. Civ. P. 15(a) must be

freely given where justice would so require. Here the matters sought to be raised by the Bank arose out of the same transaction with the bankrupt, were directed at the same issue of material falsity already being litigated, and were within the knowledge of the bankrupt and his counsel.

Accordingly, this court finds that the Bankruptcy Judge abused his discretion in denying the Bank's motion for leave to amend. On remand the Bankruptcy Court should consider the Bank's allegations regarding the 1968 bankruptcy and a $24,250 error in debts from relatives along with the notation on the Maye P. Cox trust. It is then incumbent upon the Bankruptcy Court to decide whether, as a whole, the financial statement submitted to the Bank was materially false and, if so, whether the financial statement was submitted with an intent to defraud. In light of this court's ruling on the amendments and the remand of this cause, it is unnecessary to decide whether the Bankruptcy Court erred in declaring the financial statement to be not materially false based solely on the listing of the trust.

It is therefore, ORDERED, ADJUDGED, and DECREED that the above-styled-and-numbered adversary proceeding be, and the same is hereby, remanded to the Bankruptcy Court for proceedings consistent with this Memorandum Opinion and Order.

DONE at Houston, Texas, on this the 18th day of August, 1977.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKRUPTCY

NOS. 75-H-301
75-H-302

ADVERSARY A

IN THE MATTER OF

CHARLES MOORE BARDWELL, JR. and
RACHEL HUDGINS BARDWELL,
BANKRUPTS

SPRING WOODS BANK

v.

CHARLES MOORE BARDWELL, JR., and
RACHEL HUDGINS BARDWELL

JUDGMENT

At Houston, in said District, on the 15th day of October, 1975, there came on to be heard the Complaint of Spring Woods Bank and the Answer of Defendants; and both parties having announced ready, the Court having heard and considered the pleadings, the evidence, and the arguments of counsel, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That on January 3, 1974, Defendant, CHARLES MOORE BARDWELL, JR., obtained money from Plain-

tiff, executing a promissory note therefor without the necessity of providing a financial statement as a condition of making said loan.

2. In all of his dealings with SPRING WOODS BANK, Charles Moore Bardwell, Jr., dealt solely with W. R. Fitzpatrick, its Vice-President and Loan Officer.

3. The Maye P. Cox Trust created by the codicil of her Last Will and Testament has neither been terminated or distributed in full to the beneficiaries.

4. The January 3, 1974, note was secured by lien on the 1973 Mobile Scout purchased by CHARLES MOORE BARDWELL, JR.

5. That on or about January 19, 1974, Defendants, CHARLES MOORE BARDWELL, JR., and RACHEL HUDGINS BARDWELL, executed a joint financial statement which had been prepared for delivery to the Highland Village State Bank, said statement containing the following item ("the trust item"), to-wit: "Trust: Per Estate of Maye P. Cox, Dec., No. 73-1477-P in Dallas County".

6. That prior to March 4, 1974, Defendant, CHARLES MOORE BARDWELL, JR., delivered to William R. Fitzpatrick a xerox copy of the financial statement mentioned in No. 5 above, said copy being hereinafter referred to as "the financial statement".

7. At least since May 7, 1973, to date, RACHEL HUDGINS BARDWELL has had an interest in a Trust provided for in the Will and Codicil of her grandmother, MAYE P. COX, Deceased ("the trust").

8. That prior to January 19, 1974, the Will and Codicil of Maye P. Cox, Deceased, had been admitted

to probate in Dallas County, Texas, under Cause No. 73-1477-P.

9. RACHEL HUDGINS BARDWELL was a beneficiary of the Maye P. Cox Trust; CHARLES MOORE BARDWELL, JR., was not.

10. The Financial Statement did not disclose that the Maye P. Cox Trust was separate property of RACHEL HUDGINS BARDWELL, that it was a spendthrift trust, and that the trust would not be distributed to RACHEL HUDGINS BARDWELL until she became 35 years of age.

11. In January, 1974, RACHEL HUDGINS BARDWELL was 30 years of age.

12. That when CHARLES MOORE BARDWELL, JR., delivered the Financial Statement to William R. Fitzpatrick, William R. Fitzpatrick:

a. was himself a beneficiary of a trust,

b. was aware of the general nature of a trust,

c. believed that the assets of the trust of which he (William R. Fitzpatrick) was a beneficiary were unreachable by him,

d. considered the trust of which he (William R. Fitzpatrick) was a beneficiary to be an asset of his (William R. Fitzpatrick's),

e. considered the trust of which he (William R. Fitzpatrick) was a beneficiary to be an item properly listed on his financial statement,

f. knew the effect of a spendthrift clause,

g. had received a B.A. degree in Finance, and to acquire same had taken business law courses,

h. was familiar with all phases of Plaintiff's banking operations,

i. was generally aware of the nature and difference between "separate" and "community" property under the laws of the State of Texas, and

j. was aware that under Texas law, creditors could not reach the separate property of one spouse to satisfy the debts of the other spouse for this type of indebtedness.

13. The Financial Statement is detailed insofar as it concerns the Maye P. Cox Trust, considering the limited space available therefor.

14. The Financial Statement did not materially misrepresent the fact that the Maye P. Cox Trust was a spendthrift trust, that it was the separate property of RACHEL HUDGINS BARDWELL, and that RACHEL HUDGINS BARDWELL was not entitled to distribution until she was 35 years of age.

15. On March 4, 1974, CHARLES MOORE BARDWELL, JR., obtained $2,500.00 on credit from SPRING WOODS BANK, giving his note therefor.

16. On March 11, 1974, CHARLES MOORE BARDWELL, JR., obtained an additional $2,500.00, less one week's interest, giving his note for $5,000.00.

17. Both notes dated March 4, 1974, and March 11, 1974, were unsecured.

18. Part of the money SPRING WOODS BANK loaned by the March 4 and March 11, 1974, notes was

obtained for and used by CHARLES MOORE BARDWELL, JR., for expenses and operation of his business of practicing law.

19. In making loans on March 4 and March 11, 1974, William R. Fitzpatrick relied in part upon the representations made by CHARLES MOORE BARDWELL, JR., in the Financial Statement concerning the Maye P. Cox Trust, and in making the subsequent renewal and extension notes, William R. Fitzpatrick relied in part upon the representations made by CHARLES MOORE BARDWELL, JR., in the Financial Statement concerning the Maye P. Cox Trust.

20. That at no time did Defendant, CHARLES MOORE BARDWELL, JR., represent to Plaintiff that he had an interest in the trust.

21. That at no time has Defendant, RACHEL HUDGINS BARDWELL, obtained money or property on credit or otherwise from Plaintiff.

22. That at no time was Defendant, RACHEL HUDGINS BARDWELL, requested by Plaintiff to join with Defendant, CHARLES MOORE BARDWELL, JR., in executing any of the notes or documents representing Defendant's, CHARLES MOORE BARDWELL, JR., indebtedness to Plaintiff.

23. That at no time was Defendant, RACHEL HUDGINS BARDWELL, requested by Plaintiff to in any manner guarantee or in any manner collateralize any indebtedness owed by Defendant, CHARLES MOORE BARDWELL, JR., to Plaintiff.

24. That at no time has Defendant, RACHEL HUDGINS BARDWELL, been a licensed and/or practicing attorney at law.

25. That at no time has Defendant, RACHEL HUDGINS BARDWELL, had any interest in the law practice of Defendant, CHARLES MOORE BARDWELL, JR., other than that acquired, if any, by virtue of her marriage relationship, said relationship existing since 1961.

CONCLUSIONS OF LAW

1. That Defendant, RACHEL HUDGINS BARDWELL, did not make a materially false statement in writing to Plaintiff respecting her or her husband's financial condition.

2. That Defendant, RACHEL HUDGINS BARDWELL, did not make any false representations to or engage in any false pretenses with Plaintiff.

3. That Defendant, RACHEL HUDGINS BARDWELL, did not obtain money or property on credit or otherwise from Plaintiff by virtue of false pretenses, false representations or a materially false statement in writing.

4. That Defendant, RACHEL HUDGINS BARDWELL, was not engaged in business, as that term is used in § 14(c)(3) of the Bankruptcy Act.

5. That Plaintiff is not a creditor of Defendant, RACHEL HUDGINS BARDWELL.

6. That Defendant, CHARLES MOORE BARDWELL, JR., did not make a materially false statement in writing to Plaintiff respecting his or his wife's financial condition.

7. That Defendant, CHARLES MOORE BARDWELL, JR., did not make any false representations to or engage in any false pretenses with Plaintiff.

8. That Defendant, CHARLES MOORE BARDWELL, JR., did not obtain money or property on credit or otherwise by virtue of false pretenses, false representations or a materially false statement in writing.

It is therefore

ORDERED, ADJUDGED and DECREED that the relief sought by the Plaintiff is in all things DENIED.

/s/ JOHN R. BLINN
Bankruptcy Judge

Entered at Houston, Texas, November 25th, 1975.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKRUPTCY NOS. 75-H-301
75-H-302

ADV. A

IN RE

CHARLES MOORE BARDWELL, JR., AND
RACHEL HUDGINS BARDWELL,
Bankrupts

SPRING WOODS BANK,
Plaintiff

v.

CHARLES MOORE BARDWELL, JR. AND
RACHEL HUDGINS BARDWELL
Defendants

ORDER

At Houston, on the 30th day of September, 1975, came on for hearing the Plaintiff's Motion for Leave to Amend and the Defendants Objections thereto, and the Court, having heard the evidence and argument of counsel, and having examined the pleadings and briefs, and being fully apprised hereof, is of the opinion that leave to amend should be granted in part and denied in part; it is accordingly

ORDERED that Spring Woods Bank is granted leave to amend to include the allegation that it is a creditor of both defendants, subject to proof of same other than by virtue of a community interest which Defendant Rachel Hudgins Bardwell may have in a law practice; it is further

ORDERED that Spring Woods Bank is denied leave to amend and Defendants objections are sustained as to (a) all allegations relating to notes payable to relatives; (b) all allegations relating to failure to complete a blank inquiring about a prior bankruptcy, and; (3) all allegations relating to oral representations of Defendants to Plaintiff.

ENTERED at Houston on this 10th day of October, 1975.

/s/ JOHN R. BLINN
John R. Blinn
Bankruptcy Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BANKRUPTCY NOS. 75-H-301
75-H-302

ADV-A

In Re:

CHARLES MOORE BARDWELL, JR., AND
RACHEL HUDGINS BARDWELL,
BANKRUPTS

SPRING WOODS BANK

v.

CHARLES MOORE BARDWELL, JR. AND
RACHEL HUDGINS BARDWELL

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

To The Honorable John R. Blinn, Bankruptcy Judge:

NOW COMES SPRING WOODS BANK, Plaintiff in the above entitled and numbered proceeding and makes its Motion For Leave To File Amended Complaint, pursuant to Rule 715, Bankruptcy Rules and Rule 15, Federal Rules of Civil Procedure, and in support thereof would respectfully show the Court as follows:

I.

Defendants' responsive pleading to Plaintiff's Original Complaint has been filed and served upon the undersigned counsel in this proceeding more than twenty days prior to the filing of this Motion.

II.

Following discovery, both by production of documents and deposition in such cause, Plaintiff desires to amend its Original Complaint for the following regards:

1. Restating and rephrasing much of the original pleading regarding Plaintiff's Section 14 and Section 17 Complaint, specifying the dates and specific obligations which Plaintiff would show arose when Defendants gave SPRING WOODS BANK their financial statement which, Plaintiff would further show, was materially false.

2. Adding two additional matters, contained in such financial statement which Plaintiff would further show are also materially false: the omission from such financial statement of over $24,250.00 owing on promissory notes to Defendant RACHEL HUDGINS BARDWELL'S Mother, Doris Cox Shook which sum was not included in such financial statement under the heading "Notes Payable To Relatives" and the omission from such statement of any reference to Defendant CHARLES MOORE BARDWELL, JR.'s 1968 bankruptcy proceeding which should have been disclosed in response to the printed inquiry, "Have You Ever Taken Bankruptcy? Explain: . . .", on the front page of the financial statement.

III.

Defendants cannot claim either surprise or prejudice from the inclusion of the two additional grounds described above. The Defendants' schedules before this Court reflected an indebtedness due and owing Doris Cox Shook of $93,650.00 but did not reveal the date of the notes underlying such indebtedness. Through discovery this Plaintiff subsequently learned that as of the date of their financial statement, January 18, 1974, said Defendants were indebted to Doris Cox Shook on notes totalling at least $54,250.00. Additionally, Defendant CHARLES MOORE BARDWELL, JR.'s 1968 bankruptcy was fully described in his petition herein in response to Question No. 7 on Page 1 (Prior Bankruptcy) of Official Form 7.

IV.

By its Amended Complaint, this Plaintiff does not seek to impose any new cause of action against the said Defendants but simply adds two additional grounds for complaint based upon the same financial statement made the subject of its Original Complaint. The time within which said Defendants would be required to answer or respond to Plaintiff's Amended Original Complaint is well within the time set by this Court by its Pre-Trial Order of August 7, 1975 for filing Pre-Trial Statements.

V.

Plaintiff does not bring this Motion or its Amended Complaint for the purpose of injuring the Defendants or imposing any unnecessary burden upon them or their counsel, but instead seeks by this amendment to bring all of the material issues concerning Defendants' transactions with SPRING WOODS BANK before this Court.

WHEREFORE, PREMISES CONSIDERED, SPRING WOODS BANK prays for leave of this Court to file and serve upon Defendants its Amended Complaint, a copy of which is attached hereto and incorporated herein by reference and for such other and further relief, general and special, legal and equitable, to which Plaintiff may be justly entitled.

/s/ DON STOCKING
Don Stocking
P. O. Box 42262
Houston, Texas 77042
461-5241
Attorney for Spring Woods Bank

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has this day been mailed to attorney for Defendants: Mr. Dale Ledbetter, 305 Houston Bar Center Building, Houston, Texas 77002, by United States Mail, Postage Prepaid, Certified, Return Receipt Requested, this 16th day of September, 1975.

/s/ DON STOCKING
Don Stocking

SUBMISSION DATE

The above and foregoing Motion shall be submitted to the Court in regular order on Monday, September 22, 1975.

/s/ DON STOCKING
Don Stocking

STATEMENT REQUIRED BY PARAGRAPH H OF LOCAL RULE 16:

The above and foregoing Motion, filed concurrently with Plaintiff's Trial Statement herein does not violate any limitation on time for filing imposed by the local rules or special order of this Court in this case. Counsel for Defendants, Dale Ledbetter, has met and conferred with the undersigned counsel by telephone conversation between the two attorneys, held on September 12, 1975 at 11:20 o'clock, A.M., and after reviewing all of the text of the Plaintiff's Proposed Amended Complaint and after a sincere attempt on behalf of both counsel to resolve such differences, said counsel for Defendants remained and is inalterably opposed to the filing of such Amended Complaint in this cause.

SIGNED in Houston, Harris County, Texas, this 15th day of September, 1975.

/s/ DON STOCKING
Don Stocking

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Bankruptcy Nos. 75-H-301
75-H-302

In Re:
CHARLES MOORE BARDWELL, JR. and
RACHEL HUDGINS BARDWELL,
Bankrupts

SPRING WOODS BANK

v.

CHARLES MOORE BARDWELL, JR. and
RACHEL HUDGINS BARDWELL

COMPLAINT

NOW COMES SPRING WOODS BANK, a state banking corporation organized and existing under the laws of the State of Texas with its principal office and place of business in Houston, Harris County, Texas, hereinafter called "Plaintiff" complaining of the Bankrupts herein, CHARLES MOORE BARDWELL, JR. and RACHEL HUDGINS BARDWELL, hereinafter called "Defendants", and makes and files its objections to the discharge of said Defendants pursuant to the provisions of Section 14c(3) of the Bankruptcy Act (11 U.S.C. § 32) and, alternatively, makes and files its objection to the dischargeability of the indebtedness owed SPRING WOODS BANK, pursuant to the provisions of Section

17a(2) of the Bankruptcy Act (11 U.S.C. § 35) and for cause of action would show as follows:

I.

Plaintiff is a general, unsecured creditor of Defendant, CHARLES MOORE BARDWELL, JR., and has filed its Proof of Claim herein this day setting forth the particulars of such indebtedness to which reference is hereby made for all purposes.

II.

Heretofore, to-wit: On or about January 19, 1974, Defendant was engaged in business as a sole proprietor, engaged in the practice of law in Houston, Harris County, Texas, and on or about such date obtained for such business, money from Plaintiff on credit, for which Defendant made, executed and delivered to Plaintiff his promissory note, which indebtedness was subsequently extended, renewed and increased up to the balance which is described in Plaintiff's Proof of Claim. Defendant, CHARLES MOORE BARDWELL, JR. obtained such credit, and the consequential increases, extensions and renewals of such credit by making and publishing, and by causing to be made and published jointly with Defendant, RACHEL HUDGINS BARDWELL, a materially false statement in writing respecting his financial condition. Defendant's wife, RACHEL HUDGINS BARDWELL, also a defendant herein, joined with Defendant, CHARLES MOORE BARDWELL, JR., in making and publishing such materially false statement. Such written false statement was set forth in a personal statement respecting the financial affairs of both Defendants, dated January

19, 1974; such statement was materially false in that Defendants represented that they owned the following item: "Trust: per estate of Maye P. Cox, Dec., No. 73-14-77-P in Dallas County". Defendants represented that the value of such asset was $175,000.00. Such statement was materially false for the following reasons: Although Defendant, RACHEL HUDGINS BARDWELL is a beneficiary of such Trust, such Trust provided that she was not to receive a distribution thereof until she had attained the age of 35, which age said Defendant would not have attained for several more years, and further that said Defendants' interest in said Trust is subject to a "spendthrift clause" which has the effect of making such asset unavailable to Defendants' creditors prior to its distribution. At the time such materially false representations were made to SPRING WOODS BANK, the Defendants, and each of them, knew the same to be false. More particularly Defendant, CHARLES M. BARDWELL, JR., being an attorney duly licensed and qualified to practice law in the State of Texas, knew that the effect of the "spendthrift clause" in the Trust Agreement would prevent Defendants' creditors from reaching such asset prior to distribution; Defendants, and each of them, made such false and untrue statements with the intention to deceive the Plaintiff and to wrongfully induce the Plaintiff to loan money to CHARLES M. BARDWELL, JR. and thereafter to extend and renew the indebtedness. In good faith reliance upon the representations made by Defendants, Plaintiff, SPRING WOODS BANK, proceeded to advance the requested money to Defendant, CHARLES M. BARDWELL, JR., and thereafter, in further good faith reliance upon such materially false representations, increased, extended and renewed such advances. But for the above-

described materially false representations made by both said Defendants, Plaintiff would not have made the loans or the extensions and renewals thereof; the Defendants' materially false statements were a contributing cause to the extension of the credit. By reason of the above and foregoing, Plaintiff would show that under Section 14 of the Bankruptcy Act, Defendants, and each of them, are not entitled to a discharge.

III.

In the alternative, without waiving any of the above and foregoing, and only in the event that for any reason this Court should find that the said Defendants are entitled to a discharge under Section 14 of the Bankruptcy Act, then Plaintiff would respectfully show that pursuant to Section 17a(2) of the Bankruptcy Act that the indebtedness due and owing SPRING WOODS BANK by said Defendant, CHARLES M. BARDWELL, JR. is in itself not dischargeable by reason of the following: The materially false representations described in Paragraph II above constituted materially false statements, in writing respecting the Defendant's financial condition, which Defendants, and each of them, made, published and caused to be made and published with the intent to deceive Plaintiff for the purpose of obtaining money from Plaintiff on credit. Said false and fraudulent representations were made at or about the time of the inception of the indebtedness described in Plaintiff's Original Petition; said materially false statements described above were false when made and were false at or about the time of the execution and delivery of the promissory note described in Plaintiff's Proof of Claim.

IV.

By reason of the above described materially false representations, Plaintiff was and has been induced by Defendants to make the loans and the extensions of credit described above in good faith reliance that, upon default, Plaintiff would be entitled to seize or attach the assets described in Defendants' financial statement. In the event that Defendants are granted a discharge herein, Defendants would be unjustly enriched at the expense of the Plaintiff, who was deceived by said Defendants into believing that such Trust assets would be available to Defendants' creditors generally.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court, pursuant to provisions of Rule 704, Rules of Bankruptcy Procedure, set a date for trial herein and forthwith issue a summons and notice of trial, to be served upon said Defendants in the manner and the method set forth in said rule, and upon service of citation, said Defendants appear and answer herein, and upon final hearing hereof that this Court issue its Order denying the discharges as pled for by Defendants in their Petition herein, pursuant to Section 14 of the Bankruptcy Act, or, alternatively, and only in the event that such Court fails or refuses for any reason whatsoever to deny the Defendants discharges, then in such event, this Court make its Order denying the dischargeability of Defendants' indebtedness due and owing Plaintiff as set forth in its Proof of Claim pursuant to Section 17a(2) of the Bankruptcy Act, and that Plaintiff recover its costs herein expended, and for such other and further relief, legal

and equitable, general and special, to which Plaintiff may be justly entitled.

/s/ DON STOCKING
Don Stocking
P. O. Box 42262
Houston, Texas 77042
461-5241
Attorney for Spring Woods Bank

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Bankruptcy Nos.
75-H-301 and 75-H-302
Adv. "A"

IN RE:
CHARLES MOORE BARDWELL, JR. and
RACHEL HUDGINS BARDWELL,
Bankrupts

SPRING WOODS BANK,
Plaintiff

v.

CHARLES MOORE BARDWELL, JR. and
RACHEL HUDGINS BARDWELL,
Defendants

PRE-TRIAL ORDER FOR § 14 AND § 17 COMPLAINTS

The above complaint having come on for a Pre-Trial Hearing this 7th day of August, 1975, it is ORDERED as follows

I

This matter will be tried on the 14th day of October, 1975 at 9:00 o'clock A.M.

II

All discovery procedure will be completed by the 15th day of September, 1975.

III

The plaintiff and defendant shall each file with the Court, with copies to opposing counsel, or to a party not represented by counsel, a TRIAL STATEMENT setting forth the following:

A. A short concise statement of the factual matters intended to be established at trial. Plaintiff shall include a statement as to what particular section of the Bankruptcy Act each alleged act is alleged to violate. Defendant shall further state generally what factual matters stated by plaintiff in plaintiff's statement are in dispute as well as any affirmative defenses thereto.

B. A short concise statement of any legal questions believed to exist.

C. A list of witnesses expected to be called during trial, their addresses, and a brief statement of what is expected to be proved by each witness. If the testimony of any witness is to be offered other than by the actual presence of the witness, this must also be indicated as well as the source of the evidence.

D. A list and brief description of all exhibits expected to be offered in evidence or referred to in trial. All such exhibits offered at trial will be deemed admitted into evidence by agreement of counsel except those exhibits specifically disputed in the respective TRIAL STATEMENTS. In the case of documents alleged to establish liens, a photo-copy of such document shall be attached

to the TRIAL STATEMENT and on trial a photo-copy of such document shall be admitted the same as the original unless three days prior to trial written notice is given to the Court and opposing counsel and any party not represented by counsel, that production of the original is required, its unavailability proved, or the admissibility of the copy otherwise established at trial under Federal Rules of Evidence.

E. In § 17 complaints involving loans from a creditor to the bankrupt or debtor the creditor shall further set forth the following:

1. The date credit was first extended to the bankrupt or debtor, whether or not it was in connection with the particular debt or obligation here in issue.

2. Whether the debt now in issue is a renewal or extension or an original obligation, and if a renewal or extension, a chronological listing of renewals and extensions, the dates thereof, and whether or not additional money was advanced at that time and if so how much.

3. The amount alleged to be due, broken down as to principal, interest, penalties, or any other charge alleged to be owing.

4. A statement by the creditor that the debtor or bankrupt or his counsel may examine the complete loan file of the creditor at any reasonable time and place prior to trial without the necessity of formal discovery proceedings; or a statement that the entire loan file will be voluntarily produced at trial; or a statement that the entire file will not be voluntarily produced at trial.

F. A statement as to the estimated time to try the complaint.

G. Such TRIAL STATEMENT shall be filed and served by plaintiff on or before the 15th day of September, 1975, and by defendants on or before the 29th day of September, 1975.

IV

All exhibits will be marked by the parties for identification prior to trial, designating such exhibits by the name of the party offering the same followed by an exhibit number. (For example "Jones Exhibit 1")

V

The Court will not arrange for a court reporter. Any party desiring a court reporter must make arrangements therefor prior to trial.

VI

Any evidence not fairly raised or exhibits not revealed by the TRIAL STATEMENTS referred to herein shall not be admitted during trial except on showing that such evidence was not previously known to the party, and could not have been discovered by the exercise of reasonable diligence prior to trial. If any additional evidence is discovered by any party after the filing of a TRIAL STATEMENT but before the date of trial, a SUPPLEMENTAL TRIAL STATEMENT must be filed and served immediately, including a statement as to when such additional evidence was discovered, how it was discovered, and why it was not discovered earlier. Whether said evidence will be admitted on trial will be determined by the Court in its discretion.

VII

Upon failure of any party to comply with any material portion of this Order the complaint may be dismissed or the party denied the right to introduce evidence at the trial. The times stated in this Order are material to the efficient administration of these proceedings.

VIII

Motions for continuance whether agreed to or opposed will be acted upon by the Court at the time set for trial unless otherwise ordered by the Court. The parties may not assume that an agreed motion for continuance will be granted. All other Pre-Trial Motions are to be filed within 5 days after the required submission date of Defendant's TRIAL STATEMENT as set forth in Paragraph III(g) above. Amendments to pleadings previously filed will not be permitted by parties after the filing of their respective TRIAL STATEMENTS except where relevant matters have arisen after the preparation and filing of such statement or when matters existing at such time were not discovered until after such time and counsel or a party unrepresented by counsel was not negligent in failing to obtain the information earlier.

IX

Prior to the time testimony is taken in any § 17 trial both parties will state to the Court that a bona fide effort has been made to resolve the controversy without the necessity of a trial.

X

Any exhibits received in evidence or placed in court custody during trial will be destroyed by the Court 30 days after judgment is entered unless an appeal is undertaken by that date or unless withdrawn on proper motion and order.

XI

TRIAL STATEMENTS and SUPPLEMENTAL TRIAL STATEMENTS may not be used to enlarge the scope of the issues beyond those properly alleged by complaints, answer or other duly filed pleading but shall serve only to define the issues properly raised by pleadings duly filed in conformity with the Bankruptcy Rules and applicable Federal Rules of Civil Procedure.

XII

The purpose of Rule 16, Federal Rules of Civil Procedure is, among other things, to define the issues for trial. Counsel are therefore directed to assist in such purpose and to advise the Court of those issues disposed of by admissions or agreements of counsel and thereby to assist in the administration of cases before this Court.

Entered this 7th day of August, 1975.

Bankruptcy Judge

B.O.F. 12-S (Rev. 3-74)

UNITED STATES DISTRICT COURT
for the Southern District of Texas

Bankruptcy Nos. 75-H-301
75-H-302

In re
Charles Moore Bardwell, Jr.
Rachel Hudgins Bardwell

---

*Bankrupt**

ORDER FOR FIRST MEETING OF CREDITORS AND FIXING TIMES FOR FILING OBJECTIONS TO DISCHARGE AND FOR FILING COMPLAINT TO DETERMINE DISCHARGEABILITY OF CERTAIN DEBTS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the bankrupt, his creditors, and other parties in interest: Charles Moore Bardwell, Jr. and Rachel Hudgins Bardwell of** 12 Valley Forge, Houston, Texas, having been adjudged a bankrupt on a petition filed by him on 4-10-75, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at Bankruptcy Court, 10007 U. S. Courthouse, 515 Rusk Ave., Houston, Texas on May 8, 1975, at 10:15 o'clock a.m.

---

* *Include all names used by bankrupt within last 6 years.*

** *State post office address.*

2. The bankrupt shall appear in person [*or, if the bankrupt is a partnership,* by a general partner, *or, if the bankrupt is a corporation,* by its president *or other executive officer*] before the court at that time and place for the purpose of being examined.

3. June 9, 1975 is fixed as the last day for the filing of objections to the discharge of the bankrupt.

4. June 9, 1975 is fixed as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c(2) of the Bankruptcy Act.

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims, elect a trustee, elect a committee of creditors, examine the bankrupt as permitted by the court, and transact such other business as may properly come before the meeting.

AS A RESULT OF THIS BANKRUPTCY, CERTAIN ACTS AND PROCEEDINGS AGAINST THE BANKRUPT AND HIS PROPERTY ARE STAYED AS PROVIDED IN BANKRUPTCY RULES 401 AND 601.

If no objection to the discharge of the bankrupt is filed on or before the last day fixed therefor as stated in subparagraph 3 above, the bankrupt will be granted his discharge. If no complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of § 17a of the Bankruptcy Act is filed within the time fixed therefor as stated in subparagraph 4 above, the debt may be discharged.

In order to have his claim allowed so that he may share in any distribution from the estate, a creditor must file a claim, whether or not he is included in the list of creditors filed by the bankrupt. Claims which are not filed within 6 months after the above date set for the first meeting of creditors will not be allowed, except as otherwise provided by law. A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

Unless the court extends the time, any objection to the report of exempt property must be filed within 15 days after the report has been filed. The last day to file claims —Nov. 7, 1975.

At the meeting the Court will consider whether an order will be entered authorizing the sale of all non-exempt property of the bankrupt, free and clear of all liens and encumbrances, at public or private sale with valid liens attaching to the proceeds of the sale. Any secured creditor objecting to said sale must file with the Court written notice that he does object to said sale or be deemed to have consented to said sale with his valid liens attaching to the proceeds thereof.

Mail all letters, claims and other communications to: Bankruptcy Court, 10108 U. S. Courthouse, 515 Rusk Ave., Houston, Texas 77002

Dated: April 28, 1975.

For an answer from the Court include a self-addressed, stamped envelope. Phone 226-4536.

JOHN R. BLINN
Bankruptcy Judge

77-1791

Supreme Court, U. S.
FILED
JUL 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1971

In the Matter of:
CHARLES MOORE BARDWELL, JR., ET AL.,
Bankrupts.

CHARLES MOORE BARDWELL, JR., ET AL.,
Petitioners

v.

SPRING WOODS BANK,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DON STOCKING
101 Simonton, Suite 201
Conroe, Texas 77301
Attorney for Respondent,
Springs Woods Bank

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Statutory and Rules Provisions Involved	2
Statement of the Case	2
Argument and Authorities	3
Conclusion and Prayer	6

LIST OF AUTHORITIES

CASES	Page
Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)	4

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 15	2, 3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1971

In the Matter of:
CHARLES MOORE BARDWELL, JR., ET AL.,
Bankrupts.

CHARLES MOORE BARDWELL, JR., ET AL.,
Petitioners

v.

SPRING WOODS BANK,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, SPRING WOODS BANK, (hereinafter called "SPRING WOODS"), respectively prays that this Honorable Court deny a Writ of Certiorari upon the Petition of CHARLES MOORE BARDWELL and RACHEL HUGGINS BARDWELL, (hereinafter called "BARDWELL"), and let the Judgment of the United States Court of Appeals for the Fifth Circuit stand in this Cause.

STATUTORY AND RULES PROVISIONS INVOLVED

Rule 15 (c) Federal Rules of Civil Procedure, provides in pertinent part as follows:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

STATEMENT OF THE CASE

The Statement of the Case offered by Petitioner, BARDWELL, glosses over the facts that from the date that the complaint was filed, May 14, 1975 to the close of the trial, October 15, 1975, scarcely five months had elapsed, and that SPRING WOODS made its Motion For Leave To Amend one month before trial, just after the close of the depositions. The adversary action filed by SPRING WOODS was one of three such actions against the BARDWELLS, each based on the January 18, 1974 Financial Statement. SPRING WOOD'S initial complaint was based on the wrongful inclusion of the trust item, as described in BARDWELL'S statement of the case. The complaints asserted against BARDWELL in the other adversary actions alleged that the January 19, 1974 financial statement was materially false due to the trust item and further alleged that the same financial statement was false because the item "notes payable to relatives" was understated by $24,250.00. The adversary actions were not consolidated for trial by the Bankruptcy Judge, but were consolidated for discovery, which was held beginning September 3, 1975, pursuant to notice (Appendix 14-16; References to "Appendix" are to the Appendix filed in the United States Court of Appeals, Fifth Circuit, No. 77-2931.) During discovery, as later with the trial, SPRING WOODS led off and the other complainants followed, so that although SPRING WOODS finished its discovery on September 5, the other parties continued their depositions for several days. On September 15, before the depositions had been typed up, SPRING WOODS filed its Motion for Leave to Amend, together with its trial statement, seeking to amend to include the specifications of material falsity in the financial statement based on the notes on the "notes payable to relatives" item and the inquiry about prior Bankruptcies, all in the same financial statement. Four days later the Bankruptcy Court ordered that a hearing on the Motion for Leave to Amend be set for September 30, 1975, and on September 29, 1975 BARDWELL filed his objection to SPRING WOOD'S Motion for Leave to Amend. The hearing was held on September 30, 1975, and on October 10, 1975 the Bankruptcy Court, for the first time, announced its decision to overrule SPRING WOOD'S Motion to Amend and signed an order to such effect (Appendix 38). Four days later the case proceeded to trial.

ARGUMENT AND AUTHORITIES

Essentially, the Petitioner, BARDWELL, ignores the "relation back" doctrine of Rule 15 (c) F.R.C.P. quoted above, and proceeds to draw exaggerated conclusions about the effects of the rulings of the District Court and the Court of Appeals.

Both the original complaint and the amendments offered by SPRING WOODS alleged only that the

BARDWELL'S financial statement of January 18, 1974 was materially false; the amendments simply added that the item "notes payable to relatives" on the January 19, 1974 financial statement was false because BARDWELL in fact owed $24,250 more to his relatives than the financial statement had stated, and because BARDWELL had in fact initiated a bankruptcy action in 1968, contrary to his negative answer in the January 19, 1974, financial statement to the question "Have you ever taken bankruptcy?" These additional specifications clearly concerned and arose out of the same occurrence, event and transaction specified in the original petition.

BARDWELL has offered nothing to show ". . . undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc. . . .", the conditions stated in *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), as necessary to justify denying the Motion for Leave to Amend. This case took five months from the original complaint through the trial; SPRING WOODS attempted to amend in the usual course of the trial, just after the completion of deposition with its trial statement. Although SPRING WOODS knew of the allegations of the other complaints, no one can deny that SPRING WOODS was first entitled to discovery before filing its amendments about the prior bankruptcy item (BARDWELL *could* have had a good reason for the negative answer) and the "notes payable to relatives" item (BARDWELL *could* have paid off or some how discharged these debts prior to the date of the financial statement).

BARDWELL has simply not shown how these proferred amendments are outside the "relation back" doctrine of Rule 15 (c); relation back is limited by that rule to same event, occurrence and transaction of the original complaint.

Finally, all of the arguments and authorities raised in BARDWELL'S Petition for Writ of Certiorari were thoroughly considered by the District Court and by the United States Court of Appeals, Fifth Circuit, both by brief, reply brief, and motions for rehearing, filed in each court. BARDWELL has shown no conflict among the circuit court decisions which should be resolved by this court. BARDWELL still has his day left in court; the District Court opinion only remanded the cause back to the Bankruptcy Court for further trial consistent with its order and the Fifth Circuit affirmed without dissent. This Petition only delays the final trial and disposition of the case without any clear showing of any need for this Honorable Court's supervision under Rule 19, Revised Rules of the United States Supreme Court.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent, SPRING WOODS, prays that this Honorable Court deny the Writ of Certiorari of Petitioners, CHARLES MOORE BARDWELL and RACHEL HUGGINS BARDWELL and allow the decisions of the United States Court of Appeals, Fifth Circuit and the District Court, Southern District of Texas, Houston Division, to stand.

Respectfully Submitted,

DON STOCKING
101 Simonton, Suite 201
Conroe, Texas 77301
Attorney for Respondent,
Spring Woods Bank